No. 92307-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff / Respondent,

v.

RAMON CARRILLO-ALEJO,

Appellant / Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

Cause No. 13-1-01132-4 KNT / COA No. 71027-3-I

The Honorable Lori K. Smith, Judge

PETITION FOR REVIEW / RAP 13.4(b)

RAMON CARRILLO-ALEJO DOC368411
Appellant / Petitioner

Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

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A. IDENTITY OF PETITIONER

Ramon Carrillo-Alejo (Petitioner) asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals decision in State v. Ramon Carrillo-Alejo, No. 71027-3-I, filed on September 14, 2015, attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. PETITIONER WAS CHARGED WITH TWO COUNTS EACH OF FIRST DEGREE CHILD MOLESTATION AND FIRST DEGREE CHILD RAPE FOR INCIDENTS INVOLVING THE COMPLAINING WITNESS, F.H. THE COURT RULED, OVER DEFENSE OBJECTION, THAT OTHER UNCHARGED INCIDENTS BETWEEN PETITIONER AND F.H. WERE ADMISSIBLE UNDER ER 404(b) TO PROVE LUSTFUL DISPOSITION, RES GESTAE, AND F.H.'s DELAY IN REPORTING THE ALLEGED INCIDENTS. DEFENSE COUNSEL FAILED TO REQUEST A LIMITING INSTRUCTION, PROPOSE HER OWN, OR EXPLAIN THAT SHE DID NOT WANT AN INSTRUCTION. WHERE A PROPER LIMITING INSTRUCTION COULD HAVE SUFFICIENTLY MITIGATED THE HARM FROM THE 404(b) EVIDENCE, WAS PETITIONER DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE REPRESENTATION WHEN DEFENSE COUNSEL FAILED TO PROPOSE SUCH AN INSTRUCTION, AND COULD SUCH A COLOSSAL FAILURE TRULY BE A TACTICAL DECISION IN LIGHT OF COUNSEL'S OBJECTIONS TO THE ADMISSION OF THE EVIDENCE?

2. THE PROSECUTOR PLACED INADMISSIBLE AND HIGHLY PREJUDICIAL EVIDENCE BEFORE THE JURY BY ELICITING TESTIMONY FROM THE VICTIM ABOUT OTHER UNCHARGED ACTS, BY REFERRING TO PETITIONER AS NOT FROM THIS COUNTRY TO DRAW AN INAPPROPRIATE INFERENCE OF PROPENSITY TO COMMIT SUCH ACTS, BY IMPROPERLY EXPRESSING HER PERSONAL OPINION AS TO PETITIONER'S GUILT, AND BY MAKING A STATEMENT WHICH IMPLIED DEFENSE COUNSEL WAS CHARACTERIZING F.H. AS A DIABOLICAL CHILD. DID THESE MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT, INDIVIDUALLY AND CUMULATIVELY, HAVE A MATERIAL AFFECT ON THE OUTCOME OF THE TRIAL AND VIOLATE PETITIONER'S RIGHT TO A FAIR TRIAL?

3. THE TRIAL COURT ALLOWED THE STATE TO INTRODUCE 404(b) EVIDENCE TO PROVE LUSTFUL DISPOSITION, RES GESTAE, AND F.H.'s DELAY IN REPORTING THE ALLEGED INCIDENT WITHOUT WEIGHING (MAKING A CONSCIOUS DETERMINATION) THE EVIDENCE'S PROBATIVE VALUE AND ACTUAL PREJUDICIAL IMPACT. DID THE TRIAL COURT ABUSE IT DISCRETION AND DENY PETITIONER A FAIR TRIAL BY NOT LIMITING THE INTRODUCTION OF 404(b) EVIDENCE?

D. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged petitioner with two counts of first degree child molestation and two counts of first degree child rape for incidents with F.H. between April 9, 2005 and July 31, 2012. CP 8-9. A jury found petitioner guilty of both counts of child molestation and one count of child rape. CP 49, 51-52. The jury found petitioner not guilty of one count of child rape. CP 50; 9RP[1] 8-9.

The trial court imposed standard range indeterminate concurrent sentences of 165 months to life on the child rape conviction and 100 months to life on each of the child molestation convictions. CP 53-63; 10RP 14. Petitioner then filed a timely appeal. CP 65-77.

2. Trial Testimony

Petitioner met Maria Ontiberros-Aguirre while working

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[2] This petition refers to the verbatim report of proceedings as follows: 1RP - 8/1/2013; 2RP - 8/5/2013; 3RP - 8/6 & 7/2013 (voir dire); 4RP - 8/7/2013; 5RP - 8/13/2013; 6RP - 8/19/2013; 7RP - 8/20/2013; 8RP - 8/21/2013; 9RP - 8/22/2013; and 10RP - 10/11/2013 (sentencing).

at a golf course. 6RP 34, 58, 84; 7RP 16. They soon became friends and petitioner moved in with Ontiberros-Aguirre's family. 6RP 34, 59, 83-83. Also living at the apartment were Ontiberros-Aguirre's husband, Abraham May Mex, and daughter, F.H. 6RP 34-35, 59, 83-83; 7RP 15, 20. Petitioner moved to different housing several times with the Ontiberros-Aguirre family and always had his own bedroom. 6RP 35, 38, 42, 61, 71; 7RP 17. Petitioner and F.H. had a good relationship and she called him "uncle." 6RP 44; 7RP 22-23. Petitioner would sometimes watch F.H. while Ontiberros-Aguirre and May Mex worked. 6RP 41, 44, 48; 7RP 18-19, 21.

Eventually, petitioner's wife moved in with F.H.'s family. 6RP 46, 62, 86, 104; 7RP 45. Petitioner and his wife moved out shortly before Ontiberros-Aguirre gave birth to a son. 6RP 42, 62-63, 105; 7RP 46, 96-97.

Petitioner visited the family after moving out and would occasionally take F.H. and her brother out. 6RP 48, 52, 69, 89, 108. Ontiberros-Aguirre noticed F.H. "happily" went with petitioner the first time but went to her room and refused to talk to him the second time he came to take them out. 6RP 52-55. May Mex noted that F.H. did not appear to respect or trust petitioner. 6RP 88, 90, 109. Around this same time, F.H. also began crying at night and refused to sleep in her own bedroom. 6RP 54-55, 91-92, 107. F.H. would sleep with Ontiberros-Aguirre and May Mex. 6RP 54, 92.

In the fall of 2012, F.H. told her school counselor, Amy Cameron, about sexual contact between herself and petitioner. 6RP 20-21, 24; 7RP 73, 82-83. Carmeron described F.H. as very agitated and teary-eyed during the disclosures. 6RP 20-21, 24. Cameron reported the allegations to child protective services (CPS). 6RP 21. Police contacted the family after receiving Camerion's CPS referral. 6RP 57, 72-73, 113-14.

Police interviewed petitioner and he acknowledged living with F.H. and her parents, and watching F.H. while her parents worked. 7RP 131-33. Petitioner denied every touching F.H., explaining he would never disrespect "her or her family in such a way." 7RP 133.

Ontiberros-Aguirre acknowledged she never saw any strange behavior between F.H. and petitioner and that F.H. never appeared afraid around him. 6RP 65. May Mex also never saw or suspected any inappropriate behavior between petitioner and F.H. He also noted that F.H. never appeared afraid around petitioner. 6RP 104.

F.H. described several alleged incidents. One time, after petitioner carried her from the bathroom to the bedroom, she said he took her underwear off and licked her "privates." 7RP 25-27, 38. Petitioner stopped when he heard May Mex's car pull into the driveway. 7RP 28. F.H. did not tell May Mex about the incident because petitioner told her not to and said there would be consequences if she spoke about the

incident. 7RP 30, 54-55, 59. F.H. explained she was scared of petitioner after this incident and did not want to talk to him. 7RP 31-32.

Another time petitioner tried to grab F.H. but she ran out of the house. F.H. had to massage petitioner on the shoulder as punishment. 7RP 32-36. During this time, petitioner gave F.H. gifts of money, clothes, and stuffed animals. 7RP 37, 65. F.H. also described an incident where petitioner took F.H. and her friend, Anna, to his bedroom. Petitioner removed F.H. and Anna's pants, kissed Anna and licked F.H.'s "privates." 7RP 38, 41, 107-08, 111. F.H. pushed petitioner away and went to her room with Anna. Anna and F.H. did not discuss the incident. 7RP 42-43, 108.

On another occasion, petitioner made F.H. grab his "private part" until "white things came out." 7RP 60-63, 70, 86-87. On separate occasions F.H. said petitioner kissed her mouth and breast, and came into the shower with her. 7RP 64, 78-80, 84-85. Petitioner also said he would buy F.H. an iPhone if "they did it." F.H. refused even though she was not sure what petitioner meant. 7RP 46-50. F.H. eventually told Cameron about the incidents because she was having nightmares. 7RP 73, 75, 82-83.

3. ER 404(b) Evidence

Before trial, the State moved to admit evidence of several uncharged acts between F.H. and petitioner. Relying on F.H.'s

interviews with child forensic interviewer, Carolyn Webster, defense counsel, and her disclosure to school counselor Amy Cameron, the prosecutor sought to introduce three types of uncharged incidents under ER 404(b). Supp. CP ___ (sub. no 33, State's Trial Memorandum, at 9-15); 2RP 67-69, 73, 109-11, 113-14.

The prosecutor offered petitioner's threats to F.H. not to tell her parents about the charged incidents or "something bad would happen," as well as gifts of clothes, candy, and money to explain F.H.'s delay in reporting the alleged incidents and to rebut accusations that F.H. fabricated the alleged incidents. Supp. CP ___ (sub no. 33, State's Trial Memorandum, at 9-10, 12-14); 2RP 109-10. The prosecutor explained that the gifts "explain how F.H. delayed in telling because she feared that he (petitioner) may not continue giving her gifts, especially when her family was so poor as to not be able to normally afford such luxuries for her." Supp. CP ___ (sub no. 33, State's Trial Memorandum, at 12).

The prosecutor offered F.H.'s disclosure that petitioner would kiss her, put his tongue in her mouth, touch her, and ask her to massage him as evidence of a lustful disposition toward F.H. Supp CP ___ (sub no. 33, State's Trial Memorandum, at 14-15); 2RP 110-11. Finally, the prosecutor argued, "the threats and collateral sexual contact" between petitioner and F.H. were relevant to show the res gestae of the charged crimes.

Supp. CP ___ (sub no. 33, State's Trial Memorandum, at 12); 2RP 109-11.

Defense counsel objected, arguing petitioner also bought F.H.'s brother candy and clothing and there were no allegations of inappropriate contact in those instances. 2RP 111-12. Defense counsel explained, "I'm not seeing the connection between buying her things specifically and that either being part of his threat to her not to tell or her being fearful that she would no longer receive these gifts." 2RP 112. Defense Counsel also noted that she recalled F.H. disclosing only one threat by petitioner not to tell her parents. 2RP 113.

The trial court granted the prosecutor's request. The court found by a preponderance of the evidence all the acts described by F.H. in the interview occurred. The court further explained the uncharged acts offered by the prosecutor were relevant to show petitioner's lustful disposition, res gestae, and to explain F.H.'s delay in reporting the alleged incidents. 2RP 115-18. Defense counsel failed to request a limiting instruction, propose her own, or explain she did not want or need an instruction.

During direct examination, F.H. testified that petitioner had abused her another time when her friend Anna was present. 7RP 38. After F.H.'s testimony that petitioner had grabbed her and Anna and taken them to his room, the prosecutor asked

F.H. "what happened in his bed?" 7RP 38. The prosecutor then proceeded to ask F.H. several other questions about Anna's presence and involvement during the alleged abuse of F.H. 7RP 41-43. The prosecutor also asked F.H. if petitioner ever told her any other information about "what he had done before." 7RP 59. F.H. stated, "he told me he killed people in his place." 7RP 59. The prosecutor asked F.H. "what place," and she said "In Ondoda." 7RP 59. Then, during closing argument, the prosecutor called attention to the fact that petitioner was not from this country and told F.H. that he had killed people there, in his country, to prevent her from telling, to draw an unwarranted inference that he was a bad character because of his race and/or nationality. 8RP 51.

During closing argument, the prosecutor also argued that the worry was too much for F.H., she was having nightmares and crying, and was not wanting to tell, but she nevertheless did. 8RP 51. Then the prosecutor summarized this argument by telling the jury that petitioner had molested F.H. and exposed her to things no child should know, and "that is why he is guilty." 8RP 52. Later in rebuttal argument, after defense counsel attempted to argue her theory of the case, that F.H.'s testimony was inconsistent and her credibility questionable, the prosecutor indicated twice that defense counsel "pointed to a couple of differences and said — here is essentially this diabolical child," and later "if F.H. is

some kind of diabolical child, wouldn't that be the first thing she would say?" 8RP 68, 71.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

In relevant part, RAP 13.4(b) states:

> Considerations governing acceptance of review. A petition for review will be accepted by the Supreme Court only:
>
> 1. If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
>
> 2. If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals;
>
> 3. If a significant question of law under the constitution of the State of Washington or of the United States is involved.

RAP 13.4(b)(1-3). Petitioner argues that all three of the above-referenced provisions warrant review in this case.

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A LIMITING INSTRUCTION FOR 404(b) EVIDENCE

Petitioner's counsel was ineffective for failing to propose a 404(b) limiting instruction. Reversal is required because there is no tactical reason for failing to request a limiting instruction after lodging objections and because a reasonable probability exists that the lack of a limiting instruction materially affected the outcome of the trial. The Court of Appeals states that counsel's performance was not deficient because the record shows her decision not to request a limiting instruction was tactical. Appendex A - Slip Opinion, pg. 6.

Because counsel objected to the 404(b) evidence and was clearly aware of the risk of prejudice from its admission, there was no reasonable trial strategy for not requesting a limiting instruction. The Court of Appeals decision hedges counsel's failure to propose a limiting instruction as a legitimate trial tactic based on arguments counsel made to mitigate the damage as a result of the 404(b) evidence being introduced. Id. Argument made to mitigate the damage cannot "truly" be tactical when the risk of prejudice is obvious; clearly, a limiting instruction accompanied by argument to mitigate damage would have been the only legitimate tactic, i.e., ask for the limiting instruction and then argue to mitigate the evidence. Arguing to mitigate the evidence without a limiting instruction constituted deficient performance.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment to the U.S. Constitution and Article 1, Section 22 of the Washington State Constitution. Strikland v. Washington, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Id.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute

reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

a. Counsel's Failure to Demand a Limiting Instruction was Deficient.

ER 404(b) "is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that a person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Consistent with this categorical bar, the defendant is entitled, upon request, to a limiting instruction expressly prohibiting jurors from using any portion of the State's 404(b) evidence for propensity purposes. Gresham, 173 Wn.2d at 423. Consistent with the express language of ER 404(b), juror's in petitioner's case needed to be told the one way in which they absolutely could not use the evidence. Cf. State v. Kennealy, 151 Wn.App. 861, 891, 214 P.3d 200 (2009)(limiting instruction correct); State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995)(same).

In petitioner's case there was no legitimate reason not to insist on a limiting instruction given the prejudicial nature of the character evidence. Had counsel requested an instruction, the court would have been required to give one.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2006). Here, defense counsel's decision not to request an instruction, or to propose a limiting instruction of her own, is puzzling since she acknowledged the ER 404(b) evidence demonstrated petitioner's propensity to victimize F.H.

Under certain circumstances, courts have held the decision not to request a limiting instruction may be legitimate trial strategy because such an instruction can highlight damaging evidence. See e.g., State v. Barragan, 102 Wn.App. 754, 762 9 P.3d 942 (2000)(failure to propose a 404(b) limiting instruction proper where evidence of prior fights was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" rationale is inapplicable here. Evidence that petitioner threatened, kissed, and bribed F.H. with money, clothes, and candy was not of a fleeting nature. F.H. testified to these things. 7RP 32-35, 37, 49-50, 59, 64-65, 125. Even without a limiting instruction, the jury could not reasonably be expected to forget this testimony. In fact, the prosecutor made a point of arguing petitioner's alleged threats and bribes toward F.H. corroborated the veracity of her testimony. 8RP 40, 43-44. This is not a case where a limiting instruction raised the specter of "reminding" the jury of briefly reference evidence. This evidence formed a central piece of the State's case. As such, counsel's failure to propose an adequate limiting instruction fell below the standard expected for

effective representation. The was no reasonable trial strategy for not requesting a limiting instruction. Counsel simply neglected to request a necessary limiting instruction. Such neglect constitutes deficient performance. See State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)(counsel has a duty to know the relevant law); State v. Carter, 56 Wn.App. 217, 224, 783 P.2d 589 (1989)(counsel is presumed to know court rules); and State v. Tilton, 149 Wn.2d 775, 784 P.3d 735 (2003) (finding failure to present available defense unreasonable).

b. Counsel's Deficient Performance Prejudice Petitioner.

Absent a limiting instruction, jurors were free to consider the evidence for whatever purpose they wished, including for an improper purpose. There is no reason to believe the jury did not consider the uncharged acts evidence as evidence of petitioner's propensity to commit the charged crimes against F.H. Nor is there any reason to believe the jury disregarded the prosecutor's argument that petitioner's alleged threats and bribes toward F.H. corroborated the veracity of her testimony. The jury is naturally inclined to treat evidence of other bad acts in this manner. State v. Bacotgarcia, 59 Wn.App. 815, 822, 801 P.2d 993 (1990). Indeed the need for an instruction explaining the purpose of uncharged acts is "particularly important in sex cases, where the potential for prejudice is at its highest." State v. Dawkins, 71 Wn.App. 902, 909, 863 P.2d 124 (1993).

It is reasonably likely the jury would have reached a different result absent an inference that petitioner was of a character to victimize and commit sexual offenses. See Wiggins v. Smith, 539 U.S. 510, 537, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)(test for "reasonable probability" of prejudice is whether it is reasonably probable that, without the error, at least one juror would have reached a different result). Petitioner's constitutional right to effective assistance of counsel was violated. This Court should grant review and reverse his convictions.

2. MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL

At trial the prosecutor improperly asked questions and made comments that placed inadmissible and highly prejudicial information before the jury. A new trial is required because, individually and cumulatively, the multiple instances of misconduct materially affected the verdict and violated petitioner's right to a fair trial.

The Court of Appeals addressed the prosecutor's reference to petitioner's nationality, but refused to address the other misconduct claims on the basis that no authorities were cited or argument made as to why or how the alleged misconduct was flagrant or ill intentioned. Appendix A - Slip Opinion pgs. 7 - 8. With regard to the misconduct related to referencing petitioner's nationality, the court concluded there was no

impropriety because, during closing argument, "These brief mentions ... did not appeal to the jury prejudice or imply that a member of his nationality was more likely to commit the crime charged than a person of another nationality." Appendix A - Slip Opinion, pg. 8.

The right to a fair trial is guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). To prevail on a claim of prosecutorial misconduct, petitioner must establish the misconduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If the defendant does not object to the alleged misconduct at trial, the issue of prosecutorial misconduct is waived, "unless the misconduct was 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006).

a. Uncharged Acts Related to F.H.'s Friend Anna.

After F.H.'s testimony that petitioner had grabbed her and Anna and taken them to his bedroom, the prosecutor asked "what happened in his bed?" F.H. stated that petitioner took

Anna's pants off. The prosecutor then proceeded to ask F.H. other questions about Anna's presence and involvement during the alleged abuse of F.H. 7RP 38, 41-43. This line of questioning was clearly flagrant and ill-intentioned. Petitioner was not charged with any crimes against Anna, and thus any evidence of alleged acts against her were inadmissible. Further, the evidence was highly prejudicial because it implied petitioner may have not only committed crimes against F.H., but may have also committed crimes against Anna that he was not charged with. This Court has held similar questioning to be flagrant misconduct. See e.g., State v. Montague, 31 Wn.App. 688, 690-92, 644 P.2d 715 (1982); State v. Torres, 16 Wn.App. 254, 256, 554 P.2d 1069 (1976). By eliciting this testimony, the prosecutor flagrantly placed inadmissible and highly prejudicial evidence before the jury. Individually, this misconduct requires a new trial.

b. Reference to Petitioner's Nationality.

During direct examination, the prosecutor asked F.H. if petitioner had ever told her any other information about "what he had done before." 7RP 59. F.H. stated, "he told me he killed people in his place," ... "in Ondoda." Id. During closing argument the prosecutor called attention to the fact that petitioner was not from this country and suggested that he made the statement to prevent F.H. from telling. 8RP 51. This line of questioning and argument was flagrant and ill-

intentioned because it allowed the jury to infer that because he was of another nationality he was more likely to have committed the crimes against F.H. This Court has held similar misconduct to be flagrant. See e.g., State v. Suarez-Bravo, 72 Wn.App. 359, 367, 864 P.2d 426 (1994); State v. Torres, 16 Wn.App. at 257; and State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Individually, this misconduct requires a new trial.

c. Personal Opinion as to Petitioner's Guilt.

During closing argument, the prosecutor argued that petitioner molested and exposed F.H. to things no child should know, exclaiming "that is why he is guilty." 8RP 52.

Here, the assertion of guilt that concluded the prosecutor's argument followed not a summary of the evidence but the prosecutor's inflammatory comments about F.H.'s emotional state of mind and fear of "what no child should know." The prosecutor did not couch her assertion of guilt in terms of the evidence, instead it was her own personal opinion. Thus, the prosecutor impermissibly expressed her opinion to the jury as to why she felt petitioner was guilty — implying they should do the same. This was not only unethical but extremely prejudicial. State v. Case, 49 Wn.2d 66, 68, 298 P.2d 500 (1956). Individually, this misconduct requires a new trial. See e.g., State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

d. Disparaging Comments about Defense Counsel.

During closing argument, defense counsel attempted to argue her theory of the case asserting F.H.'s testimony was inconsistent and therefore her credibility questionable. In rebuttal, the prosecutor twice accused defense counsel of calling F.H. a "diabolical child." 8RP 68, 71.

Here, it was highly improper to tell the jury that "Ms. Wilson has pointed to a couple of differences and said -- here is essentially this diabolical child" who makes things up. 8RP 68. This was extremely ill-intentioned and disparaging because the prosecutor not only discredited defense counsel's theory but asked the jury to imply that counsel referred to F.H. as an "evil child" who was not to be believed. Similar disparaging comments have been held improper. See e.g., State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011); State v. Negrete, 72 Wn.App. 62, 66, 863 P.2d 137 (1993). Individually, the disparaging comments require a new trial.

e. Cumulative Effect of Misconduct Requires Reversal.

Here, the cumulative effect of the above described flagrant and ill-intentioned misconduct requires reversal, especially where the only evidence of the charged crimes was F.H.'s testimony. State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984). As such, no curative instructions could have obviated the prejudice engendered by the cumulative effect of the misconduct. State v. Belgarde, 110 Wn.2d at 507. Cumulatively, the

misconduct deprived petitioner of a fair trial, requiring reversal of his conviction and a new trial.

3. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED PETITIONER A FAIR TRIAL BY NOT LIMITING THE INTRODUCTION OF ER 404(b) EVIDENCE

Here, the trial court admitted 404(b) evidence without actually weighing the evidence's probative value against its actual prejudicial impact. See this petition Argument 1; 2RP 115. A new trial is required because the evidence materially affected the outcome of the trial and denied petitioner a fair trial. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Relevance and prejudice is particularly important is sex cases, where the potential for prejudice is at its highest. State v. Coe, 101 Wn.2d at 780-81. Because the evidence was highly prejudicial the court should have limited its introduction and the failure to do so requires reversal.

The record must demonstrate the trial court made a "conscious determination" that the evidence's probative value outweighed its prejudicial impact. State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981).

a. Failure to Limit the Evidence was Error.

Here, defense counsel's arguments focused on F.H.'s credibility and not whether she fabricated the claims. As such, the propensity evidence was unnecessary and offered only to establish petitioner acted in conformity with the charged crimes. Its probative value was clearly outweighed by the

prejudicial impact because it was not offered for other purposes, such as motive, opportunity, intent, plan, identity, ect. State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009). Thus, the trial court's failure to limit the introduction of evidence was error.

b. The Error was Highly Prejudicial.

An accused cannot avail himself of error as a ground for reversal unless it was prejudicial. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Here, the only inference the jury could draw from the evidence was that because petitioner committed other acts he more likely committed the crimes charged. Without its introduction, there is a reasonable probability that the outcome of the trial would have been different. Wiggins v. Smith, 539 U.S. at 537. It was a pure credibility match that should not have been infected with highly prejudicial propensity evidence. The error was prejudicial and deprived petitioner of a fair trial. Reversal is required.

F. CONCLUSION

For the reasons discussed above, this Court should grant review, reverse petitioner's convictions, and remand the case for a new trial.

DATED this 12 day of OCTOBER, 2015.

Respectfully Submitted,

Ramon Carrillo-Alejo DOC368411
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

CERTIFICATE OF SERVICE / MAILING

I, Ramon Carrillo-Alejo, hereby certify and declare that I served a true and correct copy of the following document(s): PETITION FOR REVIEW, on opposing cosunel, as follows:

(X) U.S. Mail First Class Postage Prepaid
Deposited in the AHCC/Prison Mailbox as Legal Mail

( ) United Parcel Service, Next Day Air
( ) ABC/Legal Messenger
( ) Inter-Institution Mail/AHCC
( ) Hand Delivered By:

TO: STEPHANIE D. KNIGHTLINGER, WSBA No. 40986
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney Office
W554 King County Courthouse
516 3rd Avenue
Seattle, WA 98104

I, Ramon Carrillo-Alejo, certify and declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct.

EXECUTED this 12 day of OCTOBER, 2015, at Airway Heights, Spokane County, Washington.

X 

Ramon Carrillo-Alejo, DOC368411
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

Appendix A

Slip Opinion
State v. Ramon Carrillo-Alejo
Cause No. 71027-3-I
Filed 9-14-2015

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 71027-3-I
	)	
	)	DIVISION ONE
Respondent,	)	
	)	UNPUBLISHED OPINION
v.	)	
	)	
RAMON CARRILLO-ALEJO,	)	
	)	
Appellant.	)	FILED: September 14, 2015

SPEARMAN, C.J. — On August 22, 2013, Ramon Carrillo-Alejo was convicted of one count of rape of a child and two counts of child molestation. He appeals, claiming that defense counsel was ineffective for failing to request a limiting instruction for evidence admitted under ER 404(b). In a statement of additional grounds, he also asserts claims of prosecutorial misconduct, abuse of discretion, and a Brady[1] violation. We find no error and affirm.

FACTS

Ramon Carrillo-Alejo and F.H.'s mother met when they were coworkers. When Carrillo-Alejo needed a place to live, he arranged to rent a room in the apartment shared by F.H. and her parents. He continued to live with the family when they moved first to one and then to another residence.

[1] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

F.H. was four or five years old when Carrillo-Alejo moved in with her family, and she was almost nine when he moved out. F.H.'s parents often worked two jobs and Carrillo-Alejo sometimes cared for F.H. while her parents were at work. F.H. and her parents treated Carrillo-Alejo as a member of the family and F.H. called him "uncle." Verbatim Report of Proceedings (Aug. 8, 2013) at 44.

F.H. testified that Carrillo-Alejo began to sexually abuse her when she was about seven years old. She described multiple incidents of Carrillo-Alejo placing her hand on his penis, masturbating on her, and performing oral sex on her. F.H. did not tell anyone about the abuse until the fall of 2012 when she told her school counselor, Amy Cameron. Soon thereafter F.H. disclosed the abuse to her mother. Her parents had noticed changes in her behavior the previous summer when F.H. began having nightmares, refused to sleep alone in her room, and refused to greet Carrillo-Alejo.

Ms. Cameron reported F.H.'s disclosures to Child Protective Services. (CPS). Detective Angela Galetti followed up with the victim's family. Galetti interviewed Carrillo-Alejo, using Officer Diego Moreno as Spanish interpreter. Carrillo-Alejo acknowledged that he had lived with F.H.'s family and had taken care of F.H. while her parents worked, but denied abusing her. Galetti had Carolyn Webster, a child interview specialist employed by the prosecutor's office, interview F.H. During the interview F.H. told Ms. Webster that Carrillo-Alejo had also had sexual contact with two of her female friends.

Evidence of Prior Bad Acts

The State moved to admit evidence that Carrillo-Alejo had warned F.H. to keep the abuse a secret and had given her gifts and candy. The State also offered evidence that Carrillo-Alejo had engaged in collateral sexual contact including kissing and massaging. The State argued the evidence was admissible under ER 404(b)[2] because the threats and gifts explained F.H.'s delay in reporting the abuse and the collateral sexual contact showed Carrillo-Alejo's lustful disposition toward F.H. The State also argued the evidence was admissible as part of the res gestae of the crime. Defense counsel objected only to the evidence of threats and gifts. The State did not seek admission of evidence that Carrillo-Alejo had had sexual contact with any other girls.

After conducting an ER 404(b) analysis,[3] the trial court admitted the offered evidence, but limited the evidence of gifts, money, and candy to those instances directly connected with incidents of abuse. Defense counsel did not request a limiting instruction.

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[2] ER 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[3] To admit evidence offered under ER 404(b), the trial court must (1) "find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012) (quoting State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

At trial, the State elicited testimony from F.H. that on one occasion Carrillo-Alejo molested both F.H. and her friend, Anna. Defense counsel did not object to the testimony and cross-examined F.H. about the incident. Counsel also questioned F.H. about an incident involving another friend, Kaley, that F.H. had mentioned in her interview with Carolyn Webster but that F.H. did not testify to on direct. Defense counsel took no exception to the court's instructions to the jury, which did not include a limiting instruction regarding the 404(b) evidence or the evidence concerning the other little girls.

DISCUSSION

Carrillo-Alejo argues that he received ineffective assistance because his trial counsel did not request a limiting instruction for the ER 404(b) evidence admitted by the trial court.[4] He argues that the jury likely used the evidence of collateral sexual activity with F.H. as evidence of propensity and the evidence of threats and gifts to corroborate the veracity of F.H.'s testimony. The State argues that defense counsel did not request a limiting instruction for tactical reasons and that foregoing the instruction was not deficient performance. The State further argues that Carrillo-Alejo has failed to show prejudice from the lack of a limiting instruction.

We review an ineffective assistance of counsel claim de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). The defendant has the burden of establishing ineffective assistance of counsel. State v. Humphries, 181

[4] We note that on appeal the only challenge to F.H.'s testimony that Carrillo-Alejo had sexual contact with other girls is raised in his Statement of Additional Grounds.

Wn.2d 708, 719-20, 336 P.3d 1121 (2014). To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance "fell below an objective standard of reasonableness and (2) there was prejudice, measured as a reasonable probability that the result of the proceeding would have been different." Humphries, 181 Wn.2d at 719-20 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 108 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Judicial review of an attorney's performance is highly deferential. Strickland, 466 U.S. at 689. The performance of an attorney "is not deficient if it can be considered a legitimate trial tactic." Humphries, 181 Wn.2d at 720 (citing State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

Where evidence is admitted under ER 404(b), "the party against whom the evidence is admitted is entitled, upon request, to a limiting instruction informing the jury that the evidence is to be used only for the proper purpose and not for the purpose of proving the character of a person in order to show that the person acted in conformity with that character." Gresham, 173 Wn. 2d at 420 (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Absent a request, the trial court is not required to give a limiting instruction. State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604 (2011). Not requesting a limiting instruction may be a tactical decision. Humphries, 181 Wn.2d at 720 (citing cases in which a limiting instruction was not requested in order to avoid drawing attention to the 404(b) evidence). The failure to request an instruction, by itself, does not establish that counsel's performance was deficient. Id.

Carrillo-Alejo fails to establish that his counsel's performance was deficient because the record shows that her decision to not request a limiting instruction was tactical. The case against Carrillo-Alejo turned on the credibility of F.H. and whether the jury believed her testimony. Instead of seeking to limit the use of the evidence regarding collateral sexual contact with F.H. and the other girls, during both cross-examination and closing argument, defense counsel chose to draw attention to it, highlight the inconsistencies in F.H.'s testimony, and thereby impeach her credibility.

During cross-examination, defense counsel questioned F.H. about inappropriate conduct with other little girls, and even elicited testimony about one of F.H.'s friends that was not mentioned during direct examination. In closing argument, defense counsel referred to this testimony and argued that the State's failure to call the other little girls as witnesses, or to investigate their alleged abuse, cast doubt on F.H.'s credibility. Similarly, defense counsel used the evidence of gifts to tell a counter-narrative, suggesting that instead of evidence of a crime, the gifts were simply indications that Carrillo-Alejo had been helpful to the family. Because counsel's choice to not seek a limiting instruction for the ER 404(b) evidence was clearly a legitimate trial tactic, it does not constitute deficient performance. Id. at 720.

In his statement of additional grounds, Carrillo-Alejo asserts three further claims: that prosecutorial misconduct violated his right to a fair trial, that the trial court abused its discretion in admitting the 404(b) evidence, and that the State withheld evidence in violation of Brady 373 U.S. 83 (requiring that prosecutors

disclose evidence in their possession or knowledge that is favorable to the defense). The claims are without merit.

To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was "'both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). If the defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is waived "unless the misconduct was 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" State v. Weber, 159 Wn. 2d 252, 270, 149 P.3d 646 (2006) (quoting State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)).

Carrillo-Alejo alleges cumulative error based on four instances of prosecutorial misconduct: introducing improper evidence about his conduct with F.H.'s friend Anna, referring to Carrillo-Alejo's nationality, expressing an opinion about Carrillo-Alejo's guilt in closing argument, and disparaging counsel for the defense. Carrillo-Alejo acknowledges, as he must, that because there was no objection to the alleged misconduct below, the higher standard of review is applicable to these claims. But, except as to his claim that the prosecutor referred to his nationality, Carillo-Alejo cites no authority and makes no argument as to why or how the alleged misconduct was flagrant and ill intentioned. Nor does he explain how a timely objection

would have been inadequate to result in either exclusion of the evidence or an instruction to the jury sufficient to mitigate any prejudice.

With regard to the reference to Carrillo-Alejo's nationality, we conclude there was no impropriety. A prosecutor may not refer to a defendant's race or nationality in order to imply that a member of defendant's race is more likely than a member of a different race to commit the crime charged. State v. Torres, 16 Wn. App. 254, 257, 554 P.2d 1069 (1976). References to race or nationality that appeal to the jury's prejudices are likewise improper. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

In this case, Carrillo-Alejo's nationality was mentioned only in passing during F.H.'s testimony when she stated that she did not disclose the abuse because Carrillo-Alejo had warned her to stay quiet and told her that he had killed people "in his place ... in Ondoda." VRP (Aug. 20, 2013) at 59-60. During closing argument, the prosecutor made reference to this testimony to explain why F.H. had delayed in disclosing the abuse. These brief mentions of Carrillo-Alejo's nationality did not appeal to the jury's prejudice or imply that a member of his nationality was more likely to commit the crime charged than a person of another nationality. The remarks were not improper.

Accordingly, we reject each of Carrillo-Alejo's claims of prosecutorial misconduct because either he waived them or failed to establish misconduct. Consequently, his claim of cumulative error also fails.

Carrillo-Alejo next claims that the trial court abused its discretion in admitting the 404(b) evidence. We review evidentiary decisions for abuse of discretion. In re Pers. Restraint of Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). To admit 404(b) evidence, the trial court must (1) find by a preponderance of the evidence that the prior misconduct occurred; (2) identify the purpose for which the evidence is offered; (3) determine whether the evidence is relevant; and (4) weigh the probative value against the risk of unfair prejudice. State v. Gresham, 173 Wn.2d at 421. The trial court properly performed this analysis. The trial court questioned the prosecutor for the purpose of the evidence, reviewed the transcript of F.H.'s interview with the child interview specialist, determined that the evidence was relevant, weighed its probative value against any prejudicial effect, and admitted only the evidence directly connected to incidents of abuse. We find no abuse of discretion.

Lastly, Carrillo-Alejo claims that the State suppressed evidence in violation of Brady. To establish a Brady violation, a defendant must demonstrate that (1) the evidence at issue is favorable to the accused; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) prejudice resulted. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); State v. Mullen, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) (quoting and explaining the Strickler test). Carrillo-Alejo's claim concerns a report prepared by F.H.'s school counselor, Amy Cameron. Ms. Cameron testified on direct examination that after speaking

with F.H. she "immediately called Child Protective Services." VRP (Aug. 19, 2013) at 21. On cross-examination, counsel for the defense asked Ms. Cameron if she kept a written record or made a written report of the incidents involving CPS. Ms. Cameron replied "[w]ell, I – I write up a report that goes to our district office, and the CPS report goes in ... I write –I write up what I have reported to CPS." VRP (Aug. 19, 2013) at 24. Carrillo-Alejo argues that this report was suppressed by the State in violation of Brady. The record is inadequate for us to consider this issue. There is no indication whether Ms. Cameron's report is favorable to Carrillo-Alejo or if the State knew of the report or ever had it in its possession. Absent such evidence, we are unable to determine whether a Brady violation occurred.

Affirmed.

Spearman, C.J.

WE CONCUR:

Schindler, J.

Becker, J.